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In The

SUPREME COURT OF THE UNITED STATES

October Term

No. A-1185

MARY JANE FRANKLIN and
DONALD FRANKLIN ..... Petitioners

vs.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below from the Kentucky Court of Appeals is styled *Donald Franklin and Mary Jane Franklin* v. *Commonwealth of Kentucky*, Ky., 490 S.W.2d 148 (1972).

JURISDICTION

Petitioners' application to invoke the jurisdiction of this Court fails to meet the jurisdictional require-

ments of 28 U.S.C. §1257(3), the proper provision for the review of a state court judgment by certiorari in a criminal case. The questions the petitioners attempt to present here under the Fourteenth Amendment to the Constitution of the United States have never been properly presented to or decided by the courts of Kentucky so as to give this Court jurisdiction to review the judgment. A review of the record of the state court proceedings in the instant case shows the petitioners did not specifically set out or raise a Federal question with the required particularity so as to bring such question to the attention of the state courts. In *Oxley Stave Company* v. *Butler County*, 166 U.S. 648, 41 L.ed 1149, 17 S.Ct. 1003 (1896), this Court said:

> ". . . the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

In raising the Federal question, it is necessary that the question be presented in the state court in such a manner that there is no doubt that reliance is upon Federal rights rather than state rights. See *New York Central and Hudson River Railroad Co.* v. *New York*, 186 U.S. 269, 46 L.ed 1158, 22 S.Ct. 916 (1901).

This application for writ of certiorari should be denied because petitioners failed to set out or raise a Federal question with sufficient definiteness so as to bring such question to the attention of the state courts and

petitioners did not present the questions to the state courts in such a manner that there was no doubt that they were asserting Federal rights instead of state rights.

Even if petitioner could be said to have raised a Federal question by intendment, it would be of no consequence in the present case. The decision of the state court was based upon a nonfederal ground, i.e., on state law; and this Court, in *Murdock* v. *Memphis*, 20 Wall 590, 22 L.ed 429 (1875), stated that it would not review a state court judgment if there is an adequate and independent state ground which supports the decision of the state courts.

Notwithstanding that petitioners have probably raised in state courts the questions they present here, the Court should decline to review because the judgment of this case was reached upon a nonfederal ground which independently and adequately supports the decision reached by the state court. The petitioners have also failed to set forth with sufficient definiteness the fact that they intended to assert a Federal right rather than a state right. Thus, the determination of the questions the petitioners bring here was unnecessary by the state court in its decision of this case.

STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE STIPULATION MADE BY PETITIONERS' COUNSEL VIOLATED PETITIONERS' FUNDAMENTAL RIGHTS.

II. WHETHER THE COURT OF APPEALS OF KENTUCKY CORRECTLY RULED THAT PETITIONERS' FAILURE TO OBJECT TO ALLEGEDLY INCOMPETENT HEARSAY TESTIMONY BARRED THEM FROM ASSERTING THAT QUESTION ON APPEAL.

III. WHETHER THERE WAS A STATUTORY PRESUMPTION OR INFERENCES CONCERNING PETITIONERS' GUILT.

STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes

KRS 217.731:

"(1) No person shall possess any dangerous drug:

(a) For his own use except as authorized in KRS 217.721 to 217.785 and 217.995.

(b) For purposes of sale or other disposal to another person except as authorized in KRS 217.721 to 217.785 and 217.995."

* * *

KRS 217.995:

"(1) Any person who violates any provision of subsections (2), (3), (4), and (5) of KRS 217.731 or who possesses any dangerous drug for the

purpose of sale or other disposal to another person in violation of paragraph (b) of subsection (1) of KRS 217.731 shall be guilty of a felony and shall be punished by confinement in the penitentiary for not more than five years or by a fine of not more than $5,000 or both. Subsequent offenses shall be punished by confinement in the penitentiary for not more than ten years or by a fine of not more than $10,000 or both."

* * *

"(3)(a) Any person in possession for his own use of any dangerous drug in violation of paragraph (a) of subsection (1) of KRS 217.731 shall be guilty of a misdemeanor and upon conviction shall be ordered to a facility designated by the Commissioner of the Department of Mental Health where a program of treatment and rehabilitation not to exceed one year in duration shall be prescribed. . . ."

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. Additional material facts and corrections will be set out in the respective arguments which follow.

ARGUMENT

I.

THE STIPULATION MADE BY PETITIONERS' ATTORNEY DID NOT VIOLATE PETITIONERS' FUNDAMENTAL RIGHTS.

Petitioners contend that the stipulation concerning stolen property made by their attorney (allegedly without their knowledge or consent) was a violation of their constitutional right of confrontation of witnesses. The Kentucky Court of Appeals ruled that the fundamental rights of the petitioners were not denied by this stipulation. It is a recognized principle that a privately retained attorney acts on his client's behalf and is required to make decisions concerning legal issues. The stipulation made by petitioner's attorney was made in order to save time and it was a decision based upon legal considerations.

It has been held by this Court that the occasional absence of the accused in the trial is not reversible error when there is no injury to his substantial rights. *Howard* v. *Kentucky*, 200 U.S. 164, 50 L.ed 421, 26 S.Ct. 189 (1906). It could be assumed that counsel who is duty bound to represent his clients to the utmost of his ability would not make such a stipulation if he thought it would adversely affect his client's case. The Sixth Amendment's right of confrontation, which has been held applicable to the states in a decision by this Court, requires that the defendant have the right to confront his accusers and cross-examine them face to face. This Court has stated in *Snyder* v. *Massachusetts*, 291 U.S. 97, 78

L.ed 674, 54 S.Ct. 330 (1934), "Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow." It appears, therefore, the Kentucky Court properly ruled that there was no violation of petitioners' substantial rights when this stipulation was made by counsel for petitioners.

II.

THE COURT OF APPEALS OF KENTUCKY CORRECTLY RULED THAT PETITIONERS' FAILURE TO OBJECT TO ALLEGEDLY INCOMPETENT HEARSAY TESTIMONY BARRED THEM FROM ASSERTING THAT QUESTION ON APPEAL.

Petitioners claim that incompetent hearsay testimony was admitted as evidence and was highly prejudicial to them. The Kentucky Court of Appeals ruled that: "No objection was made at the time and this question was not properly preserved for appellate review." The requirement that a defendant make a contemporaneous objection to allegedly inadmissible evidence serves a legitimate state purpose and was not formulated to bypass or defeat any of the petitioners' Federal constitutional rights. *Henry* v. *Mississippi*, 379 U.S. 443, 13 L.ed 2d 408, 85 S.Ct. 564 (1965).

This Court, therefore, has no jurisdiction to review this alleged error since the review was barred by the failure to make a timely objection and the rule

requiring a timely objection serves a legitimate state interest.

III.

THERE IS NO STATUTORY PRESUMPTION AS TO GUILT SO NONE OF PETITIONERS' RIGHTS WERE VIOLATED.

Petitioners contend that their constitutional rights were violated due to the fact that there was some type of inference of guilt of a felony offense from his mere possession of marijuana alone. The petitioners, in their application for writ, set forth cases which invalidate statutes which create a presumption or an inference of guilt. The applicable statute as set forth in this case has no presumption or inference included in it. The statute merely sets forth the penalties for possession of a dangerous drug for purposes of sale and provides for a less penalty for possession for one's own use.

Nowhere in the state court proceedings, including the instructions, was the jury apprised of any type of inference which stated that possession of a certain amount of marijuana would be a presumption of possession for sale. The jury was merely instructed on the offense and penalties as set forth in the statute and was allowed to decide whether the petitioners possessed the marijuana for their own use or for sale or disposal to another. This in no way could be construed as an unconstitutional statutory presumption.

The Court of Appeals correctly decided that the

evidence was sufficient to sustain the conviction of the petitioner Donald Franklin and since there is no statutory presumption, it was unnecessary for the Kentucky court to decide this issue.

CONCLUSION

The petitioners have failed to properly meet the jurisdictional requirements or to present a substantial Federal question necessary for the consideration of this Court. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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